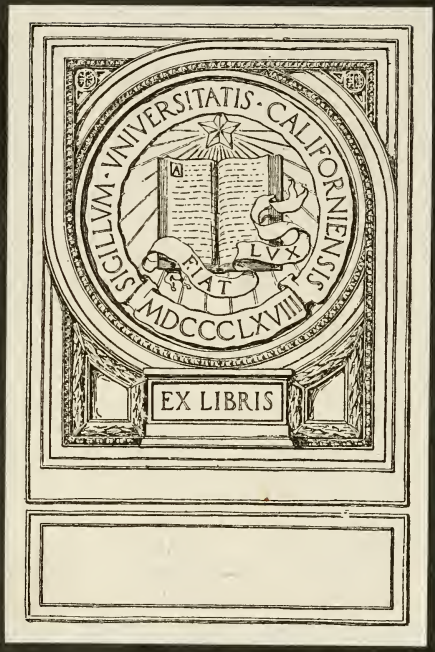
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NTERNATIONAL LAW

SOME PROBLEMS OF THE WAR

A LECTURE
DELIVERED BEFORE THE UNIVERSITY OF
OXFORD IN THE HALL OF ALL SOULS
COLLEGE ON OCTOBER 30, 1915

BY

SIR H. ERLE RICHARDS

K.C., K.C.S.I., B.C.L., M.A.

Chichele Professor of International Law and Diplomacy
and Fellow of All Souls College
Associate of the Institute of International Law

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INTERNATIONAL LAW

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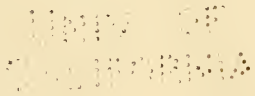
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INTERNATIONAL LAW

SOME PROBLEMS OF THE WAR

THE commencement of the new academic year finds the world still held fast in the grip of this tremendous war; there has as yet been no indication of slackening on either side: rather the tendency has been to growth than to decline. Fresh nations are being drawn into the struggle, wider areas are becoming subject to the devastation of hostilities. And the thoughts of every one of us are still absorbed in the problems that arise out of the war day by day, problems of strategy, of policy, of economics, and of international law. It is on some of the questions on this last subject that I take leave to address the University to-day, since they fall directly within the province of this Chair.

There can never have been in the history of this University an occasion when a professor, within the ordinary range of his subject, has had to deal with topics so urgent, so varied, so important, as those which have sprung up and are springing up from the legal relations of States in this war, whether between belligerents and their enemies or between belligerents and neutrals. Albericus Gentilis, the then Professor of Civil Law, lectured in Oxford on the laws of war at the time when the Spanish Armada was threatening our shores; but the law of maritime warfare was hardly developed in his day; there was little precedent and no convention; and, by happy fortune, he was relieved from

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the necessity of considering the law of military occupation or the rights of Spanish captors. There was no Chair of International Law at the time of the Napoleonic Wars or at that of the Crimea, nor can I discover that any lectures were then delivered on the Law of Nations. The mild hostilities of the Boer War, the only occasion on which this country has been a belligerent since the Chair was instituted, raised no questions at all comparable with those that face us to-day.

In the present war there are topics to hand in plenty, anxious topics that all demand consideration. An attempt will be made to discuss the greater part of them, more or less in detail, in the course of lectures which it is proposed to deliver during the current year. This afternoon there is no time to do more than to submit to you some observations on particular points of importance. On some of these points it is premature as yet to pronounce a final opinion, and on them my purpose will be attained if I succeed in explaining the main considerations which affect them and in assisting you to form a judgment upon them when the time for judgment comes.

Trade between neutrals and belligerents.

Let us turn first to the relations between belligerents and neutrals. Here the group of questions that have aroused the most controversy are those as to the restrictions which a belligerent is entitled to have imposed or to himself impose on trade between neutrals and his enemies. For instance, the right of a belligerent to insist on the prohibition by neutral States of trade in munitions of war with his enemies, or of the raising of a loan in the neutral market by his enemy; the right of a belligerent to stop and seize neutral cargoes destined for the enemy while on the high seas; these are topics of the highest importance, and, with your leave, I will discuss them in the order in which they have been stated.

Trade in munitions of war.

Now in matters of trade between neutrals and belligerents the law makes a distinction, which it is necessary to keep clearly in mind, between trade by neutral States and trade by neutral subjects. The law imposes on neutral States the duty of abstaining from giving help to either side; neutral States therefore must not assist either belligerent by sale of munitions of war or by loan of money. This principle is now established beyond possibility of challenge. And there is no hardship in the prohibition, for trade is not the ordinary business of States.

But trade between the subjects of neutral States and belligerents stands on a different footing. The law gives either belligerent power to stop that trade on the high seas in certain cases and subject to certain conditions to which I will presently refer. But it imposes no duty on neutral States to interfere with the trade of their own subjects; there is no obligation on them, for instance, to prohibit the export of munitions of war from their territories. That trade is not contrary to law; it is permitted by law, subject to the risk of seizure on the high seas. There is one exception to this rule as to the duty of neutral States, and that is in the case of trade in ships, an exception which is the creation of usage, and rests, I think, less on any general principle than on the fact that ships are, or may be, in war, of an importance altogether exceeding that of munitions or other military supplies. But subject to that exception the general rule is well established. Reference has been made to Albericus Gentilis, and it is not without interest to read the opinion given by him at the time of the Armada, that there was no legal ground of complaint against neutrals who furnished munitions of war to Spain.[1] This freedom of

[1] *De iure belli*, i. 21.

trade for neutral subjects has been consistently asserted in later times, and by no nation more clearly than by the United States, the great champions of neutral rights. The declarations on this point of Jefferson in 1793, of Story in 1822, of Webster in 1842, and of Pierce in 1855 are explicit. The practice of this country has been to the same effect. In 1870, for instance, Germany complained of the supply of munitions to France by English merchants, but Lord Granville declared that Great Britain, in not prohibiting that trade, was acting in accordance with international usage. It is true that in the war of 1870 several States in Europe did specially prohibit the export of munitions; but this was from motives of policy, in order to avoid any possible complications, and not from any sense of legal duty. Again, Germany permitted the export of arms to belligerents in the Crimean War, in the American Civil War, and in the war between Russia and Turkey in 1877; and it is understood that the great firm of Krupps have supplied munitions to belligerents in every recent war. These instances are enough to put the matter beyond doubt; but the law on the point has been confirmed and adopted by the Hague Convention of 1907 and is stated in these terms: 'A neutral power is not bound to prevent the export or transit on behalf of one or other of the belligerents of arms, munitions of war, or in general of anything which can be of use to an army or fleet.' [1]

In the present war the question of munitions has assumed exceptional importance because of the enormous use that is being made of artillery. Success in battle has come to be largely a question of the supply of munitions; and the United States, as the only neutral in a position to meet the demand on any large scale, has

[1] Convention V, Art. 7; Convention XIII, Art. 7.

developed an extensive trade in shells and other such articles of warfare. At the commencement of the war her market was open to all belligerents; but by the success of their naval operations the Entente Allies have acquired the command of the seas, and the Central Powers cannot now obtain delivery of munitions from America, at least by direct methods. That does not alter the legal position of the United States as a neutral State, nor impose upon it any new duty: for the right of United States subjects to trade in munitions is governed by International Law and not by the chances of warfare. But it is not surprising that Germany desires to stop a traffic in which she cannot share, until she can defeat her enemies on the sea. In the German Note to the United States of February 19, 1915, it is admitted that the traffic in arms is not a formal violation of neutrality, but it is suggested that the United States ought to put a stop to it as a matter of fairness. In the Memorandum of April 4 the German position is stated more explicitly. The argument there was that since the United States were practically the sole neutral vendors of munitions, and since the trade had developed in consequence of the war and since the export could only be made, under the conditions then existing, to one set of belligerents, the United States were not observing neutrality in allowing it to continue. Objection was also taken on the ground of the extent of the trade: and the same idea is to be found in the German War Book,[1] where it is laid down that the supply of munitions becomes a breach of neutrality if it is done on a large scale. There is no authority for this limitation in the Law of Nations; it is based on a suggestion of Bluntschli,[2] which has never been adopted in practice and has not met with

[1] Translation by Professor Morgan, p. 148. [2] Art. 766.

the general acceptance of jurists; and indeed the distinction he makes is clearly not one that could be made in practice, for it would never be possible to determine, in any particular case, where the line was to be drawn, or at what point it became the duty of the neutral State to interfere with her subjects' trade. And, apart from that particular objection, it seems clear that there is no foundation in law for the German protest. No complaint could be made of the law of the United States at the commencement of war: there was no obligation on the United States to take legal powers to stop trade in munitions at that time; the inequality between the belligerents with regard to access to the United States markets is due to the fortunes of war, and the law does not impose on a neutral State the duty of depriving a successful belligerent of the advantage flowing from his success. In his reply on behalf of the United States Mr. Bryan points this out, and shows that it would be a departure from neutrality to make a change in the law affecting the conduct of hostilities during the progress of the war. 'The Government holds,' he says,

'and as it is constrained to hold in view of the present indisputable doctrines of accepted International Law, that any change in its own laws of neutrality during the war which would affect unequally the relations of the United States with the nations at war would be an unjustifiable departure from the principles of strict neutrality by which it has consistently sought to direct its actions, and I respectfully submit that none of the circumstances urged in Your Excellency's Memorandum alter the principle involved. The placing of an embargo on the trade in arms at the present time would constitute such a change and be a direct violation of the neutrality of the United States.'

There the matter stands, and it cannot be doubted that as a matter of law the United States are right in their

contention. They are acting in accordance with the law, and the German grievance is due solely to the fact that the Allies have it in their power, for the time, to prevent the Germans obtaining delivery of munitions, which they are equally free to buy in the neutral market of the United States.

It has been sometimes argued that an alteration of the law would be in the interests of peace, and that if neutral trade in munitions of war were prohibited, then wars would be curtailed, if not prevented. I am unable to agree with this contention. The prohibition of the purchase of war supplies in neutral markets would give an insuperable advantage to those nations who maintained great stores of arms and great factories for munitions. That cannot be to the advantage of the world. Moreover, the change would work especial hardship in the case of small States whose resources are not equal to the maintenance of big munition establishments in time of peace. In fact, it would place the world in subjection to nations who prepared for war on the largest scale and who did not scruple to declare war whenever opportunity suited their preparations. These considerations are well summed up by President Wilson in his reply to the Austrian Note of Protest against this trade, and I cannot do better than read to you the passage from his reply :

'The principles of International Law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences and finally neutrality itself are opposed to the prohibition by a neutral nation of the exportation of arms and ammunition or other munitions of war to belligerent powers during the progress of the war.'

Loans. The question of loans raised in neutral markets stands on the same footing and is governed by the same considerations. The arrangement of loans in foreign countries is an ordinary matter of financial trade, and a belligerent has no right to call upon a neutral State to stop that trade. Some jurists have intimated opinions to the contrary based on reasons of theory, but the usage of nations puts the matter beyond doubt. In recent wars loans have been commonly raised in neutral markets. To take a late instance: in 1904 Japanese loans were raised in London and Berlin and Russian loans in Paris and Berlin. The recent loan in the United States is clearly within the law. It is of course open to Germany to raise a loan in any neutral market in the same way.

But though neutral States are under no duty to prevent their subjects from trading with belligerents, the law, as I have said, gives to belligerents themselves the power of stopping neutral trade with their enemies on the high seas, if they can catch it; but only in certain cases and on certain conditions.

Blockade. Neutral cargoes are subject to capture if bound for ports under blockade, or if, apart from blockade, they are going to the enemy country and consist of goods of the class known as 'contraband'. I shall not stop to-day to discuss the right of blockade. It is enough to say that blockade in the form in which it has been sanctioned by International Law in the past, the blockade which is limited and defined in the Declaration of London, has ceased to exist; for the reason that changes in maritime warfare have made it impossible to keep ships stationed off an enemy port for any sufficient length of time. It is certain that the rights of belligerents with regard to blockade must be extended if the right is to continue. But questions as to the fresh limits to be imposed on it:

the questions raised by the German claim to blockade the whole coast of Great Britain by submarines, or by the reprisals adopted in the British Order in Council of March last, involve wide considerations which cannot be adequately discussed within the limits at our disposal to-day.

Contraband.

As to contraband, the belligerents' right of seizure obviously depends in the first instance on the definition of contraband, and there has been a long struggle between those who from time to time have had command of the sea and those who have not: the one seeking to enlarge the list, the other seeking to restrict it. But in point of fact it seems impossible to maintain any fixed list. The substances required for the manufacture of explosives, to take one instance, vary from year to year, and it is not feasible to draw up any list in advance. An attempt to thatend was made in the unratified Declaration of London, but things have changed even since 1909, and the free list—that is, the list of articles which as agreed in that Declaration were never to be declared contraband in any circumstances—is found to-day to contain items which play an important part in the making of munitions of war. It therefore seems necessary to allow some latitude to belligerents in order that they may change their list in accordance with the changes of science. As to the limits of the right of seizure in another respect, there is a more urgent controversy at the present time. Contraband may be what is called 'absolute', that is to say, articles of such a nature that the presumption is in favour of their use by the enemy for warlike purposes; in which case the mere fact that they are going to enemy territory is enough to justify seizure and condemnation. Or it may be 'conditional', that is, articles of such a nature that they may be imported with equal likelihood for ordinary commercial purposes as for purposes of war;

Absolute and conditional.

and in the case of conditional contraband, it is not enough to establish destination to enemy territory : it is necessary to go further and to show destination to enemy forces, or at least to the enemy Government. A typical case of conditional contraband is that of foodstuffs—necessary for the enemy civilian population, necessary also for the enemy forces : free from seizure if destined for civilian uses, liable to seizure if destined for military purposes. Now this distinction is clear enough in theory, but it is not so easy to keep clear in practice, and there is much controversy at the present moment as to the proof which is necessary to warrant condemnation. In earlier times there was no great difficulty in making this distinction in particular cases. The judgment, in which the rule is formulated by Lord Stowell,[1] condemned a cargo of provisions going to Brest at a time when the French fleet was fitting out in Brest Harbour. The cargo was going to an enemy arsenal. It was a clear case of provisions going to the naval forces of the enemy. And even in cases in which the presumption was less direct, there could have been little serious doubt, because the means of transport and distribution were limited within narrow bounds. But modern conditions make it less easy to distinguish between civilian and military user. Trade and the distribution of trade goods has developed and ramified to such an extent that it is commonly a matter of the greatest difficulty to determine the ultimate destination of a cargo which is adapted equally for peaceful commerce or for military purposes. An attempt was made to formulate a test in the Declaration of London, but the test there adopted does not stand the wear and tear of practice. For instance, the presumption of destination to an enemy force under Article 34 arises

[1] The *Yonge Margaretta*, 1 Rob. 189.

'if goods are consigned to a fortified place belonging 'to the enemy, or other place serving as a base for 'the armed forces of the enemy'. It was pointed out by those who opposed the Declaration, at the time, in this country, that this provision would result in the condemnation of all cargoes bound for Great Britain; since every port, in time of war, is a place from which some military supplies are drawn, whether more or less; and that every British port would in all probability be held to be a military base by an enemy Prize Court. This prediction has been verified to the full. German Prize Courts have condemned cargoes bound for this country on the ground that they were going to an English port which the Chief of the German General Staff had decided to be a military base; and from the cases in which condemnation has been pronounced it would appear that every British port would come within the same category. The ports of Ipswich, Poole, Borrowstounness, Grangemouth, London, Dublin, and Belfast, for instance, have all been held to be military bases by the German Prize Court. In the case of the *Maria* [1] a cargo of wheat had been sold in May 1914, three months before the war, and shipped in July to the purchasers, who were merchants in Belfast and Dublin. The cargo was condemned because it was going to ports which the German Staff declared to be military bases, and it was held that the owners could not displace the presumption of destination to the British military force because they could not show that the wheat might not have been sold to the British Government after arrival. The case was one of a cargo shipped before war, with no intention of sale for military use. But it was held liable to condemnation unless the

[1] Hamburg Prize Court, reported *Hanseatische Gericht Zeitung*, April 17, 1915.

consignee could show that it was impossible for the military authorities to acquire it by purchase. It is obvious that no one could ever negative a supposition so hypothetical as this: indeed, the Court itself, with commendable frankness, remarked that the consignees to secure exemption would have to give such rigorous counter-proof that it could only be furnished in rare cases. In effect these judgments mean that German Prize Courts will condemn every cargo of foodstuffs going to the United Kingdom, and that is the view advocated by jurists in Germany. This construction of International Law is interesting, if read in the light of the German complaints that Great Britain is attempting to starve the civilian population of Germany.

On the other hand, Great Britain threatened to treat all foodstuffs going to Germany as conditional contraband at a time when the German Government had assumed the power of controlling all food imports into the country.

It is for consideration whether the distinction between absolute and conditional contraband can be maintained in the future. It is right enough in theory, but in practice the difficulties of giving effect to it are great, except in clear cases such as shipments made direct to a fleet or to an army. We have to deal with changed conditions: transport of goods is now comparatively easy in most countries; it is becoming easier everywhere every year. Nations adopt universal service, and the distinction between those enrolled in arms and those liable to serve and not yet called up, or those working for the State in the manufacture of munitions or in other ways, is a fine one. Belligerents organize their whole resources; they take control of the imports into their country in the national interests and exercise powers of requisitioning, at their will, for the needs of their forces. If a consignment of

food be definitely allocated for civil consumption, it does but relieve an equivalent amount of stock within the country and make the latter available for military use. This question of conditional contraband is one of the more important problems that demand your consideration. We should maintain the distinction if it be possible to do so; the doubt is whether it can be made possible, except in such clear cases as cargoes bound direct for a fleet or an army. But if the distinction goes, then what is to follow? Is the list of absolute contraband to be extended to cover things which are now treated as conditional contraband, or is a belligerent to have no right of stopping cargoes, such for instance as foodstuffs, going to an enemy port? The former change would be a marked extension of the power of belligerents at the expense of neutrals: it would amount to something not far short of a power to stop all trade with the enemy. Neutrals are hardly likely to assent to that proposal. On the other hand, the abandonment of any power to seize conditional contraband, as at present understood, would be a greater curtailment of the rights of belligerents than they are likely to accept. It can hardly be expected that a belligerent fleet will suffer the free passage of ships carrying provisions to the enemy's country and thereby increasing the stores from which the enemy forces draw their supplies. It seems probable that there will be some readjustment of the rights of belligerents and neutrals in the matter. Perhaps some compromise may be arrived at by giving a right of pre-emption, as distinct from confiscation, in the case of articles which come within the list of conditional contraband. Pre-emption is a practice for which there is authority in the past in the usage of this and other countries.[1]

[1] The *Haabet*, 2 C. Rob. at p. 179.

Or perhaps some agreement can be made by concessions with regard to blockade. Belligerents may be willing to surrender some of the powers which they at present possess in regard to contraband, if their powers with regard to blockade are extended. Blockade must still be effective to be binding. We can never return to the abuses of paper blockades; but there are concessions in the matter of area and locality and so forth, and particularly as to interference with traffic going to the enemy via neutral ports, which would go far to compensate belligerents for the surrender of their existing rights over contraband and would yet stop short of anything like prevention of all trade. Blockade, of course, affects all goods; so that there would then be no question of any distinction between absolute and conditional contraband. It was proposed by His Majesty's Government at the Hague Conference of 1907, that belligerents should give up the right of seizing contraband and rely for their protection on the powers given them under the law of blockade. But this was not adopted; and the experience of this war has shown that the right of blockade, as it was then limited, was not any real protection for belligerents. It has been already pointed out that the right of blockade, if it is to continue, must be enlarged; and if that is to be done, then there may be scope for some arrangement between belligerents and neutrals. It would be premature to express an opinion as yet on either of these suggestions, but I invite your consideration of them.

Continuous voyage.

Another point of importance, and for some time one of controversy, with regard to contraband, has been developed, if it has not been settled, by the events of the present war. To justify the seizure of contraband there must be *enemy destination*; but is it the immediate or the ultimate destination that is to be the test? Goods

are intended ultimately to go to the enemy but they are consigned to a neutral port and perhaps to a neutral consignee. Is the captor entitled to look beyond the immediate destination of the ship and the immediate consignee, and to seize the cargo on the ground that it is destined ultimately for the enemy? Jurists have differed on the point, and there is considerable early authority for the view that the destination of the ship is conclusive of the destination of the goods; but the usage of nations has in later years been in favour of the test of the ultimate destination of goods, or, as it is sometimes called, of the principle of 'continuous voyage' or 'continuous transport'. That view was upheld by the French Prize Court in the Crimean War[1] and by the United States Prize Courts in the Civil War,[2] and was accepted, at that time, without protest by Great Britain. It was maintained by Great Britain during the Boer War in the discussion as to the seizure of the *Bundesrath* and other vessels carrying goods alleged to be destined for the Boer forces to the neutral port of Lorenzo Marques.[3] It was confirmed by the Italian Prize Courts in the war with Abyssinia.[4] In the Declaration of London the principle of the ultimate destination of the goods is adopted in its entirety with regard to absolute contraband. If destined to enemy territory 'it is immaterial', to quote the words of Art. 30, 'whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land'. In regard to conditional contraband, the Declaration applies the opposite principle and makes the destination of the ship conclusive, but there can be no reason for the distinction. Such a compromise may have been con-

[1] The *Vrou Houwina*, Calvo v, § 2767.
[2] The *Peterhoff*, 5 Wallace, 28.
[3] Hall, 6th edition, 669 note.
[4] Ibid. 670 note.

venient at the moment, but it can hardly find a permanent place in International Law. In the present war the question has arisen in an extreme form with regard to trade between America and Germany. There are no German ports open to this trade; for apart from the operations of British ships of war, access to those ports has been rendered too dangerous for commerce by the mines which the Germans have themselves set loose in the North Sea. It follows that American trade to reach Germany must go through neutral countries, and in fact the bulk of it is directed by way of Norway, Sweden, Denmark, or Holland. If the destination of the ship were the decisive test, this trade could not be stopped; since the ships that carry it are bound for neutral ports. Contraband therefore could be freely transported to Germany, and the British fleet would have no right to interfere with it. The question has been lately before the British Prize Court in the case of the *Kim* and other vessels, and the judgment of the learned President has affirmed the so-called doctrine of 'continuous voyage'. The decisions of British courts are of course binding only within their jurisdiction, but so far as other nations are concerned it may well be questioned whether the principle will be again contested; for the course of American trade with Germany in the present war is a striking object-lesson as to the extent to which a belligerent may avail himself of neutral ports.

In my judgment liability to seizure and condemnation must depend in every case of contraband on the ultimate destination of the cargo and not on the destination of the ship. That is, I think, in accordance with usage and with the reason of the thing. The doubts that have arisen on the point seem to be due, at least to some extent, to a confusion between the principle on

which the liability to capture depends and the evidence by which the applicability of that principle to any given state of facts is determined. The law gives to a belligerent the right of stopping neutral trade in contraband, because it is trade in munitions of war or other articles to be used for military operations on its way to the enemy. The right of seizure depends firstly on the nature of the goods and secondly on their destination. Now, the evidence of this destination commonly adopted as conclusive in Lord Stowell's day was the destination of the ship; it was a rough test perhaps, but it was near enough in those times, because (and this sometimes seems to be forgotten) there was not a single railway or a single steamship in existence; the transport of goods on land or from port to port along the coast was a long laborious process. The place where the goods were to be landed was therefore sufficient evidence of their destination for practical purposes. But those conditions are all altered now. The port of arrival is some evidence of ultimate destination, but no more than that. Within the space of forty-eight hours a cargo landed in a neutral port can be carried half across a continent by rail; it can be distributed by steamboat along the coasts or by motor carriage along the roads. To establish the enemy destination on which the right of capture rests, it is necessary to go into other facts and prove by other evidence what the real destination is; and since the right of seizure must depend in principle on the real destination, it cannot matter that goods are to be landed *in transitu* at a neutral port so long as the ultimate destination be established. The destination of the ship was only evidence of the destination of the goods, and the changes in modern transport have deprived that evidence of the weight which circumstances gave to it in

the days when British Prize Law was first formulated. Nor can it matter whether the subsequent transport is to be by sea or land. The liability to capture arises from the destination to the enemy: and that destination is the same whether it be ultimately reached by land or by water. The term 'continuous voyage' is indeed misleading in this connexion, because the point is the destination of the goods, and it is unnecessary to consider the voyage of the ship except as evidence of that destination. There is no reason why we should resort to a legal fiction and consider the voyage of the ship as prolonged, when we have only to deal with the fact of the destination of goods. But the term is convenient because of the use that has been made of it in legal discussion.

Proof of enemy destination.

The further question then arises as to the evidence necessary to establish that the cargo is going on to the enemy from the neutral port. The rule of continuous voyage removes one difficulty from the captor's path; he is no longer concluded by the destination of the ship, but it still leaves him with the task of showing that the cargo seized, though bound for a neutral port, was in fact to proceed from there by land or water to the enemy country. That must be proved by direct evidence or may be presumed from the circumstances of the case in the absence of rebutting evidence. The facts disclosed in the recent case of the *Kim*, to which reference has already been made, are instructive on this point. It was established there that the imports into certain neutral countries during the present war had been of such a quantity, as compared with trade in time of peace, that they could not have been required for consumption in the countries themselves: that, on the other hand, the excess quantities corresponded more or less with the quantities of the same goods imported into Germany in time of

peace; and there was the further fact that the belligerent country had lost command of the seas and therefore could not import direct to her own ports. Evidence of that class may well be held to raise some presumption that the goods were intended for sale in the belligerent country. One case in the *Kim* was that of lard consigned to Denmark, and it was alleged that the quantity of lard carried on the ships under consideration in one month was more than thirteen times the annual average import of lard into Denmark before the war. The geographical position of Denmark makes it a convenient forwarding station for goods going to Germany, and Denmark was found taking large quantities of goods which Germany wanted and Denmark did not want. Each case must turn on the particular facts established by evidence, and since the case of the *Kim* is under appeal, we cannot, with propriety, express any opinion on it. But it is an illustration of the class of case which is arising in the present war, and it does seem that evidence of the kind referred to, if established, may well raise a presumption of enemy destination and shift the onus on to the owners of the goods to displace it by other evidence if they can. If, as has been submitted, the destination of goods is a question of fact, then the onus of proof must vary according to the presumption arising from the evidence given by the respective parties. It may be that Courts of Prize have not hitherto gone as far in this direction as the Court was asked to go in the case of the *Kim*, but conditions have changed and there seems no objection of principle against the shifting of the onus of proof on to a neutral in a proper case, given the requisite circumstances and presumption.

Changes in law

The difficulties of the present position are due largely to the fact that our sea law has been based for the past

necessitated by changed condition of naval warfare.

100 years on the traditions of the Napoleonic wars. We have made out Conventions and Declarations on the foundation of that experience. And now we have again a big naval war, and we find that things have changed and that the old limitation we have been arguing about for all these years are no longer practical. The very means by which a belligerent enforces his power of stopping neutral trade, the right of visit and search on the high seas, has been rendered impracticable by modern conditions. The large vessels of to-day cannot be subjected to search in any effective manner unless they are taken into port. If the old limitation were to be insisted on in this respect, the right of a belligerent would be gone. We must maintain the general principles of the compromise which has so long prevailed, between the right of belligerents to stop their enemies' supplies, and the right of neutrals to carry on their trade unaffected by hostilities ; but we must alter the means by which effect can be given to that compromise in order to make them conform with modern conditions. In the course of that readjustment it may be found proper to make some changes, such as that already suggested in regard to the abolition of the distinction between absolute and conditional contraband and others of a like character. The judgment of nations on new proposals of this kind must be largely influenced by reasons of policy, and the policy of particular nations is a matter for statesmen rather than for professors of law. But one note of caution may not be out of place in view of recent experiences. If radical changes are to be made in the laws of war at sea, then that should be done only after the fullest discussion. We have seen in these last few years proposals made by the Government for the time being of this country which involved sweeping alterations in the law of sea warfare,

and a surrender of weapons which the experience of this war has shown to be potent in the hands of those who have command of the sea. These changes have been proposed by the executive without any adequate public discussion: they have, in one instance at least, been pressed upon the nation as a party question and enforced by a party majority. These matters are within your recollection, and I need not refer to them in detail. It is enough to say that if the changes from time to time proposed had been adopted, the limitation imposed by them on the sea power of this country might well have had grave results in the present war. We should make certain that this country can run no risk of this kind in the future; and that if changes are to be made, they should be made only after complete and unfettered deliberation in Parliament and in the country.

Prize Courts.

One point more on the relations between belligerents and neutrals and that as to Prize Courts. According to present practice, questions of prize fall to be determined, at least in the first instance, by the Prize Courts of the captor, and it is obvious that the Court of one of the parties to a cause will hardly be accepted as a satisfactory tribunal by the other. However anxious a Prize Court may be to hold the scales evenly between captors and captured, and the Prize Courts of this country have been conspicuous in their endeavours to that end, the difficulties of securing complete confidence are great. The law of nations is on many points still uncertain: it is construed differently in different countries; and the captured, not unnaturally complains, if he is condemned on a construction of the law which in the judgment of the country to which he belongs is erroneous. Nor will the captured ever be convinced that the judges of the captor's Court are able to bring to their deliberations minds

wholly free from considerations of the advantage of their own country. Moreover, and this is a point of special difficulty, Prize Courts act under instructions issued from time to time by their sovereign. The Prize Court of this country claims to administer the law of nations, and has always reserved the question whether it has the right to disregard instructions which in its judgment were clearly repugnant to that law.[1] And his Majesty's Government have recently declared that it is open to any claimant before a British Prize Court to dispute the validity of any Order in Council on the ground that it is inconsistent with international law.[2] But it would certainly be difficult for a Court in this or any other country to maintain the position that it was independent of instructions if these were enforced by legislative authority. The Courts of Germany frankly repudiate any obligation in regard to principles of international law; they look only to the instructions of their State. In the case of the SS. *Batavier* on 1st June last the Prize Court in Hamburg stated the position in the following terms:

'The findings of the Court in regard to the claims may be premised with the following general observations:

'1. Law to be applied.—Some of the claimants have expressed the opinion in the oral proceedings that the Prize Court should apply international and not national law, or the provisions of the German Prize Regulation of the 13th September, 1909, this document not being in the nature of a legal enactment.

'This view cannot be accepted.

'The Prize Courts are national Courts. They have been established by the State in order to determine whether the warships of the latter have or have not observed the rules they are instructed to follow, and to pronounce upon the deductions to be drawn therefrom.

[1] The *Maria*, 1 C. Rob. at p. 350; the *Fox Edw.*, 312.

[2] Sir E. Grey to Mr. Page, 23 July, 1915.

This being their purpose, it is clear that they have to give judgment in compliance with the law as laid down by their State, no matter whether this agrees or not with the existing rules of international law. Whether this is the case or not is no concern of the Prize Court to decide, but of the belligerent State which alone is answerable in the matter to the other States. The view advocated by certain of the earlier authorities that the Prize Courts must apply international law, even when this has not been incorporated in their national law, must therefore be rejected in principle.'

The report of the committee appointed to examine the question at the Hague Conference of 1907 stated that although some Prize Courts claimed the liberty to disregard the instructions of their sovereign if contrary to international law, there had been no case, in any country, which a Court had in fact refused to give effect to the orders of its Government.[1]

International Prize Court.

It is for these reasons that proposals have been made for the constitution of an International Prize Court, and in the interests of the law of nations we must all hope that such a tribunal may some day be established. But there are difficulties in the way and it is useless to shut our eyes to them. There are difficulties as to the constitution of the Court; as to those matters on which the law of war at sea is yet undetermined; and as to the control of the Court during war.

You will remember the scheme adopted by the Hague Convention for an International Prize Court[2] to which appeals were to lie from Courts of captors. That proposal was agreed to in principle; but effect has never been given to it, because it was thought premature to constitute an International Court until the existing differences as to the laws of war at sea were settled by convention. That

[1] Deuxième Conférence de la Paix, La Haye, 1907, i. 182.

[2] Hague Convention XII, 1907.

has not yet been done, for the Declaration of London has not been ratified and is never likely to be proceeded with, in view of the experiences of this war. But it may well be doubted whether the Court, in the form in which it was proposed, could ever have worked with any success. It was in its very constitution a legislative assembly rather than a Court of Law. The Powers were unwilling to trust the Court at all unless they each had a representative on it. In the result it was to be constituted of eight judges representing the eight Great Powers and of seven other judges to be chosen by rotation by the lesser Powers.[1] A Court of which the judges are appointed because of their knowledge of law is one thing: a Court of which the judges are appointed because they represent the views of the country which appoints them is another and different thing. And it does not seem likely that a tribunal of this latter kind, selected on a representative basis, could ever secure general confidence. There was, however, a reason for this representative element in that the Court might be called on to give judgment in questions of law on which no generally recognized rule exists, and in such cases the Convention provides that they are to decide 'in accordance with the general principles of justice and equity',[2] and this, if it has any practical meaning at all in relation to unsettled points of maritime warfare, may be not unfairly paraphrased as 'in accordance with the general principles of policy entertained by the country of which the judge is a subject'. In effect the Court was to make law and therefore it was proper that the scheme should provide for the representation of States. Even from that point of view it was open to objection. The equality of States is a true

[1] Arts. 14, 15 and Annex. [2] Art. 7.

principle if it means that all States are equal in the eye of the law, that all have equal rights and duties ; but it cannot be true if it means that every State is to have an equal voice in settling international law, irrespective of the interest it may have in the point to be determined. In this tribunal Switzerland, with not a ship on the high seas flying her flag, would have had an equal vote with Great Britain in determining the principles of maritime law ; and the opinion of the United States would have counted no more than that of Costa Rica or of Paraguay. This is not business. The proposal would have meant the delegation to this body of a power equivalent to legislation in some matters of maritime law of wide importance, and the exercise of that power would have been determined, in case of difference, by the vote of the smallest States. It does not seem possible that a Court of this kind would ever prove successful in practice. The German Prize Court, in the case to which reference has been made, appear to acquiesce in the description of it as ' fantastic '.

An International Prize Court, if it is to have complete jurisdiction, should be empowered to sit during hostilities, for in that way it could exercise control over the action of belligerents. But the difficulties of any proposal of that sort are very great. The first difficulty that would have to be settled would be the constitution of the Court. Each side presumably would appoint one or more judges. But with whom is to be the casting vote? That may mean the power to determine the judgment of the Court. It is always a matter of difficulty to select an umpire who has no prepossessions in any case involving disputed principles of international law: it would be peculiarly difficult in such a war as the present in which the field of choice among

disinterested nations is so limited; it is also peculiarly difficult in regard to matters of sea law as to which almost every nation has traditional ideas and a traditional policy. The same difficulty no doubt exists in regard to a Joint Court of inquiry after war, but the results of a judgment at that time are of less vital importance. And this brings us to the difficulty of persuading belligerents to submit to a joint tribunal during war. A Joint Commission of review after war: an International Court of Appeal which by express restriction or from the necessary delays of the proceedings in the captor's country would sit only after hostilities were terminated, are either of them proposals which would be free from the objection that they would interfere with the strategy of a belligerent. Their judgments could do no more than impose an obligation to pay damages. But it will, I fear, be difficult to persuade belligerents to submit to the jurisdiction of a Joint Court while hostilities are still in progress; since that would in effect be to vest in the Court a control over naval operations. For instance the Court might declare the orders of a belligerent under which the capture in dispute before it was made to be invalid as against subjects of neutral powers; or it might be called on to pronounce a decision as to whether acts done by way of reprisals were justified by sufficient provocation or were in themselves excessive. From a legal point of view it is highly desirable to extend the power of the law, but it does not seem probable that belligerents will submit to a control of this kind during war. Would Germany suffer an International Prize Court to decide on the validity of her so-called blockade by submarines or on the sinking of the *Lusitania* or the *Arabic*?

A Court sitting after the termination of war is another

matter. Judgments of National Prize Courts have been submitted to review by a Joint Court after the end of the war on more than one occasion. The Jay Treaty of 1794 and the Treaty of Washington of 1871 are instances in point in disputes between Great Britain and the United States. It may be that progress on these lines is all that is practicable for the time being. It would at least be some advance towards some international control. A tribunal satisfactory to both parties is more likely to be obtained by selection after war, and, as the late Professor Westlake has suggested, the difficulty arising from the fact that on some points the law is construed differently in different countries might be avoided by a provision that the law of the captor's country should prevail on any point on which there was no general agreement.

Air-raids.

So far we have discussed the law as between belligerents and neutrals: let us turn now to a question on the laws of war as between belligerents and their enemies; to warfare in the air—a development which has grown up during the present hostilities. Air vessels were at one time employed mainly for purposes of reconnaisance, but in the present war they are becoming used, more and more, for purposes of attack. Military works behind the enemy lines can be destroyed by bombs, sea ships can be attacked by air ships, lines of communication safe from the fire of enemy artillery can be blocked by explosions, troops can be subjected to attack from above. All these are legitimate developments of warfare, and there is nothing to be said against them.

But with regard to air warfare generally I pause here to make note of the fact, that the practice of the present war seems definitely to have established the right of every state to sovereignty over the air-space above its territories.

There has been some diversity of opinion on this point, and it may be within the recollection of the members of the university that, on a former occasion, I had the honour of addressing them upon it. In the present war the claim to sovereignty has been continuously asserted by neutral states over whose territories belligerent air-craft have passed, and the claim has been sanctioned by acquiescence if not by express admission. Before war had been declared Germany complained of the passage of a French airship across her frontiers, and seemed prepared to make such a violation of her territories an excuse for war. The fact was denied, and the offence if established would have been wholly insufficient as a *casus belli*. But the point is that the claim was made. Since war began Switzerland and Holland have more than once protested against the passage of belligerent air vessels through the space above their territories; and the claim on which the protest rested seems to have been acquiesced in, though Great Britain has made some reservation in expressing her regret for the trespass of which complaint was made. We read, too, that belligerent airships crossing the frontiers of Holland and Switzerland have been attacked by the fire of the military forces in those countries, in compliance with the duty of neutral states to prevent the passage of belligerent forces across their dominions. The practice of the war is therefore consistent only with the existence of sovereignty over the air, and, for myself, I can hardly think that this claim will be further disputed.

But the use of airships has not been confined by Germany to attacks on combatant forces or on military works. The air vessels which take their names from Count Zeppelin have dropped bombs on the residential quarters of London, on the pleasure resorts of our eastern coasts,

and even on some of our country villages, and the question arises whether raids of this kind are permissible according to the accepted principles of the law of war.

In my judgment this question admits of only one answer, and that is in the negative.

According to the laws of war, military attacks must be directed only against the combatant forces of the enemy or against the positions held by them, and must have some military purpose ; in other words, they must be conceived and carried out with the object of inflicting injury on enemy combatants or on enemy combatant resources. That is the principle of the common law of nations, and it is the principle which, as I submit, underlies the enactments of the Hague Convention. If, as part of military operations, the surrender of a town is demanded and the town resists, then the non-combatants in the town must share the risks which are inevitable in any field of hostilities ; indeed, it is sometimes held, that besiegers may direct their fire against the residential quarters in order to compel submission. If, as part of military operations, an attack is made on an arsenal or other military work, the non-combatants in the vicinity must share the risks incidental to that attack. But these Zeppelin raids have no such object : the purpose is not to effect the capture of our watering-places : there is no question of a siege ; the airships carry no troops sufficient to hold a surrendered town ; they do not confine their attacks to military works, even if they attack them at all : their object is, and can only be, to create a feeling of panic among non-combatants and so to put pressure on the enemy Government. This is indeed the very object enjoined in the *German War Book*. The belligerent, it is there said, ought to seek to break the spirit of the civil population, to terrorize them, humiliate them, and reduce

them to despair.[1] This conception is a revolt against the principles for which civilization has been contending for the past two centuries. The same effect could be produced by the indiscriminate murder of non-combatants regardless of age or sex, in any invaded territory. But murder of non-combatants from the air or murder on land—and the two instances are parallel—are alike prohibited by law and by humanity. Nor is the protection of non-combatants confined by law only to their persons. The principle governs property too, and is expressed in clear terms in that part of the Hague Convention of 1907 which deals with the laws and customs of war on land. 'The right of belligerents to adopt means of injuring the enemy is not unlimited.' 'It is expressly forbidden to destroy . . . the enemy's property unless such destruction . . . be imperatively demanded by the necessities of war.'[2] In my judgment there is no defence possible for raids such as those which have taken place on London or elsewhere in this country.

But what are the excuses put forward by German apologists? It is said that the object is to damage military works. But this is a question of fact, and to decide it one has only to see what has happened in these raids. The bombs have been dropped on residential districts, on the streets and squares of our towns, and within these last few days by Austrian aeroplanes on the churches of Venice. We all know, and many of us have seen, the places where bombs have been dropped in the residential and business quarters of London. It is idle to pretend that these were aimed at military works. The arsenal of Woolwich is miles away, and there are no build-

[1] *German War Book*, translation by Professor Morgan, p. 52.

[2] Convention IV, c. III, s. ii, arts. 22, 23 (g).

ings in the vicinity which by any stretch of imagination could be called military works. These facts are not open to challenge, and in view of them it is impossible to contend that there has been any real military purpose, at least in the greater number of these raids. Indeed, if any such purpose seriously existed in the minds of those responsible for them, the objection would arise that the weapons employed are so inaccurate that their use, even for that purpose, cannot be justified. Zeppelins are compelled for their own safety to pass over enemy territory at such an altitude that it is impossible for them to drop bombs with any precision at all or to confine their attacks to any particular objects. And it would appear from a perusal of the German official reports that the crew have no accurate knowledge of the course they have actually taken.

Then again, it is said that the bombardment of defended towns is permitted, and that London is a defended town. It is true that the Hague Convention exempts from bombardment undefended towns only.[1] No definition is given of the meaning of a defended town, and it is argued that the mere existence of defences of any kind make a town liable to bombardment. Even on that view London can hardly be called a defended town. It may be that there are lines outside the area of London which the military authorities propose to hold in the case of invasion: the approach to London by the Thames is presumably guarded by forts. I know not how that is, with any exactness. I can only say, as one who has long been resident in London, that I have never seen any military defences or any trace of fortifications. It is, of course, sheer nonsense to call London a fortress. But in my view, the fact that defences exist capable of being brought

[1] Hague Conference, 1907, Convention IV, c. III, s. ii, art. 25.

into use in the event of a possible invasion, does not afford any justification for these raids. Even if a town have defences in fact, the legality of an attack on the lives and property of non-combatants must be determined by the test whether the raid is made with any military object. If it is not, then it is contrary to law. The principle is that stated in the provision as to non-combatant property already cited; destruction is permissible only if imperatively demanded by the necessities of war. The liability to bombardment arises when the surrender of a town is demanded by military forces and resistance is made by arms, and then only after notice. It is not the existence, but the use of defences, which brings the rule into play, and until the capture of London becomes the object of military operations, and London is defended against the attack, the immunity of non-combatants is complete under the law. There is no right to murder the citizens of London by raids which have no other object, or by means which if directed to other objects are so inaccurate that in effect they have the same result. If London is ever besieged, then non-combatants must share the risks which all must take who elect to stay within the zone of military operations. Until that time arrives they are protected, so far as the law can give protection.

It has been sometimes asserted that air-craft are new inventions and that new laws must be made for them, and the same reason has been put forward to justify the murder of non-combatants by submarines. Such an argument can hardly be intended to be serious. The invention of new instruments of war does not set aside the principles of humanity or the law which gives effect to them. The inventor of a machine for poisoning water or for infecting a town with plague germs cannot claim

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that the laws of war should be altered in order to permit of the effective use of his discovery

It has to be remembered that this question of air raids is not confined to the present attacks on England or to the present war. If one belligerent takes action of this kind against non-combatants, it cannot be expected that his opponents will refrain from following his example. There will be reprisals and counter-raids. A belligerent prepared beforehand to commit a breach of the laws of war may obtain a preliminary advantage, but his opponents soon equip themselves and are in a position to retaliate. There is no monopoly in these matters ; it is only a question of initial advantage. If the indiscriminate murder of the civilian population and the general destruction of civilian property is to continue, then in future wars we shall have every belligerent equipped with a fleet of airships, and the inhabited portions of every enemy country will be ravaged by bombs dropped from the clouds. The aim of the laws of war has been to alleviate as much as possible the calamities of war and to confine the military operations of belligerents to the weakening of the military forces of the enemy : [1] to spare non-combatants in the interests of humanity. But this kind of warfare is a complete reversal of that policy. Belligerents have no remedy for violations of international law during war, however gross the violations may be, except by method of reprisal ; they must succeed by arms before they can enforce the obligations of the law on their opponents. But when these matters come up for discussion after the termination of hostilities, it seems certain that the nations of the world, or at least the majority of them, will insist on putting an end to a form of warfare which is opposed

[1] See preamble to Declaration of St. Petersburgh, 1868.

to the whole spirit alike of international law and of civilization.

These are some of the problems of the war that are demanding the consideration of the public. On others I may perhaps be permitted to address the University on a future occasion.

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